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BEFORE THE

Federal Communications Commission

WASHINGTON, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934	)	WT Docket No. 97-192

REPLY COMMENTS OF
PRIMECO PERSONAL COMMUNICATIONS, L.P.

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PrimeCo Personal Communications, L.P., hereby files reply comments in the above-referenced proceeding.[1]

INTRODUCTION

Not surprisingly, the comments filed in response to the *Notice* are sharply divided. Carriers support the broad preemptive scope of the Commission's proposed rules and procedures. In contrast, local governments almost uniformly oppose the Commission's proposed rules and contend that the Commission should exercise only limited preemption over state and local RF emission regulation. As PrimeCo and other parties demonstrated in their comments, and as discussed further herein, the Commis-

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[1] *In re Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, WT Docket No. 97-197, *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, ET Docket No. 93-62, *Petition for Rulemaking of the Cellular Telecommunications Industry Association Concerning Amendment of the Commission's Rules to Preempt State and Local Regulation of CMRS Transmitting Facilities*, RM-8577, *Second Memorandum Opinion and Order ("Second MO&O") and Notice of Proposed Rulemaking ("Notice")*, FCC 97-303 (rel. August 25, 1997).

sion's preemptive authority over RF matters is paramount, even *independent* of Section 332(c)(7)(B). Section 332(c)(7)(B) expands the Commission's preemptive authority and PrimeCo submits that, to meaningfully implement Congress' intent, the Commission must exercise its authority in this area to preempt local regulation over RF matters.

SUMMARY

PrimeCo urges the Commission to adopt rules and procedures in this proceeding consistent with its exclusive authority to regulate the environmental effects of RF radiation. Specifically, Congress authorized the Commission alone to establish nationwide RF emission standards for wireless carrier facilities and to preempt inconsistent State and local regulations. The Commission's RF emissions requirements, based on the best available science and in consultation with other expert agencies, should not be undermined by State and local governments.

Accordingly, PrimeCo supports the Commission's first alternative showing proposal. This proposal strikes an appropriate balance between the Commission's exclusive authority and State and local governments' limited right of inquiry. PrimeCo opposes any showing requirements that would necessitate compliance demonstrations for categorically excluded facilities. With respect to non-categorically excluded facilities, PrimeCo supports the Commission's proposal to allow State and local governments to receive only the same compliance documentation submitted to the Commission for a particular facility as part of the licensing process.

Finally, PrimeCo asks the Commission to revise certain of its proposed procedures to comport with Congress' intent in adopting Section 332(c)(7)(B)(v) and to ensure expeditious preemption of unlawful local attempts to regulate RF matters.

DISCUSSION

I. THE RULES AND PROCEDURES ADOPTED IN THIS PROCEEDING MUST REFLECT THE COMMISSION'S EXCLUSIVE AUTHORITY TO REGULATE THE ENVIRONMENTAL EFFECTS OF RF RADIATION

Several local governments and their associations contend that the Commission has only limited authority to preempt local regulation of the environmental effects of RF emissions. These commenters argue that local governments are entitled to regulate Commission-compliant facilities in a number of ways, including requiring wireless providers, at their own cost, to document their compliance with the Commission's emission limits; to provide actual measurements of RF emissions rather than calculations; and to regulate facilities for compliance purposes on an ongoing basis after siting approval has been obtained.[2] As discussed below, these proposals are contrary to law and must be rejected.

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[2] *See* Concerned Communities Comments at 13-14, 19-20 (ongoing monitoring and measurements); Jefferson Parish Comments at 2 (carriers should bear costs); LSGAC Comments at 1 (ongoing monitoring and measurements); *see also* LSGAC Comments at 2-3 (local governments may conduct on-site visits); NYC Comments at 4-5 (documentation should be published on Internet).

A. The Commission's Authority to Establish Nationwide RF Emission Rules is Clear from Section 332(c)(7)(B)(iv)-(v) and State and Local Governments Are Not Authorized to Second-Guess Those Rules

The Commission's preemptive authority under Section 332(c)(7)(B)(iv) is clear. Localities are not allowed to regulate personal wireless service facilities on the basis of environmental effects of radio frequency emissions "to the extent that such facilities comply with *the Commission's regulations* concerning such emissions."[3] As mandated by Congress, the Commission has adopted a comprehensive regulatory regime for regulating the environmental effects of RF emissions from such facilities.[4] The Commission's rules are based on the conclusion of expert agencies and the best scientific evidence available.[5] The Commission's rules also sensibly differentiate between communications facilities more likely and those less likely to impact the human environment by categorically excluding certain facilities from environmental processing requirements.[6]

Under a plain reading of the statute then, if a personal wireless services provider complies with the Commission's environmental rules, a state or local government has no jurisdiction and that is the end of the matter. Local governments and their associations, however, posit that the proposed Commission preemption would fail to address issues such as collocation, RF interference, generic public concern for health

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3 47 U.S.C. § 332(c)(7)(B)(iv).

4 *See* 47 C.F.R. § 1.1301 et seq., 2.1091; *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Report and Order*, 11 FCC Rcd 15123 (1996) ("*First R&O*"), *amended in part and aff'd in part, Second MO&O.*

5 *See* discussion *infra* Part II.A.

6 *Second MO&O* ¶ 16.

effects, and traditional local zoning authority.[7] These concerns are unfounded.[8] The Commission has adopted comprehensive RF rules. These RF emission rules were designed to impose minimal burdens on licensees whose facilities pose minimal or no danger to the human environment. In addition, the Commission has enforcement authority to ensure that its rules are complied with and the sanctions for non-compliance are substantial. Congress has precluded local governments from second-guessing the federal approach by preempting local attempts to impose additional regulation — including procedural and paperwork burdens — on CMRS licensees.

B. The Commission's Exclusive Authority Extends to Enforcement of its Own Rules

A number of local governments contend that broad preemption would undermine enforcement of the Commission's own rules, and that ongoing local monitoring and compliance regulation is necessary.[9] The Communications Act, which was adopted "[f]or the purpose of *regulating* interstate and foreign commerce in communication by wire and radio" already affords the Commission broad authority to enforce the Act and the regulations adopted thereunder, and to impose severe penalties on

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7 Ad Hoc Comments at 5 (collocation); Jefferson Parish Comments at 2-3 (collocation and RF interference); NLC Comments at 5-7 (local authority is broad, FCC's is limited).

8 Concerns relating to collocation and the cumulative effects of adjacent facilities were addressed in the *First R&O* and *Second MO&O* in this proceeding, as well as the FCC's OET Bulletin No. 65. Local governments had the opportunity to raise these issues on reconsideration, but failed to do so. Also, regulation of RF interference, as proposed by Jefferson Parish, is clearly preempted, and any such concerns are addressed by the Commission's prior coordination rules. *See* PrimeCo Comments at 14-15 (discussing preemption of local RF interference regulation); 47 C.F.R. §§ 24.237, 101.103.

9 *See, e.g.*, NLC Comments at 24-26.

wireless service providers who violate those rules.[10] Under the Act, violations of the Commission's rules — including the environmental rules — subject licensees to forfeiture or, in extreme cases, license revocation.[11] The Commission's exclusive authority to enforce and interpret its own RF emission rules is part of its long-standing exclusive authority to regulate RF emissions. Allowing localities the authority to impose ongoing compliance burdens which the Commission itself has determined are unnecessary clearly contravenes this exclusive authority.[12]

As a related matter, the NLC's assertion that "unless a licensee's facilities are in fact in compliance with the FCC's RF rules, the Commission has literally no jurisdiction to act under subparagraph (v)" mischaracterizes the Commission's authority. It is plainly the Commission's role, not a local government's, to determine whether a licensee's facilities are in compliance with the RF emission limits.[13] Thus, if a licensee believes it has complied with the Commission's certification rules, and a local govern-

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10 47 U.S.C. §§ 154(i), 201, 303(b), 303(r), 312.

11 Indeed, the *Centel Cellular* decision cited by Concerned Communities as an example of a "carrier run amok" involved a rule violation discovered by diligent Commission staff — not an enterprising local government. *See* 10 FCC Rcd 915, 915 (1994); Concerned Communities Comments at 15-16.

12 NLC asks "what if the local government is presented with evidence that calls into question the accuracy of the information furnished by the provider." The Commission's rules already provide the answer to this question. As U S WEST notes, there is nothing to preclude a local government from conducting its own measurements and submitting a complaint to the Wireless Telecommunications Bureau in the event of noncompliance. *See* U S WEST Comments at 14-15; *see also In Re Application of Calvary Educational Broadcasting Network, Inc.*, 7 FCC Rcd 4037 (1992).

13 *See* Ameritech Comments at 8 (only Commission may pass on whether RF emission showing satisfies the Commission's rules).

ment demands additional documentation, the licensee is perfectly free to petition the Commission under Section 332(c)(7)(B) and seek preemption. The Commission — not the locality — will then determine whether the facilities are in compliance. If so, preemption is warranted and, if not, the Commission — not the locality — may initiate an enforcement proceeding. Once the noncompliant facility is brought into compliance, the locality's involvement/interest in the matter ceases. In light of the Commission's broad preemptive authority over RF matters, the Commission must decline local governments' offer to share enforcement duties with the Commission.

C. The Localities' Proposals Would Intrude Upon the Commission's Authority to Regulate RF Emissions and Radio Communications Generally

The legislative history of the 1996 Act confirms that Congress intended to preclude local involvement in RF matters. The Conference Report expressly states:

> The limitations on the role and powers of the Commission under [Section 332(c)(7)(B)] *relate to local land use regulations* and are not intended to limit or affect the Commission's general authority over radio telecommunications, including the *authority to regulate the construction, modification and operation of radio facilities.*[14]

The Commission's statutory authority to regulate the construction, modification and operation of radio facilities includes a broad array of matters.[15] Licensees are subject to construction build-out requirements and technical/operational standards that are solely the province of the Commission;[16] RF emission limits are essentially a subset of those

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14 H.R. Conf. Rep. 104-458, at 209 (1996) ("Conference Report").

15 *See* 47 U.S.C. §§ 301-303, 307, 308, 316, 318-319.

16 The Commission has long "occupied the field" and preempted state regulation of wireless technical standards. *See Head v. New Mexico Board of Examiners in*

(continued...)

technical requirements.[17] As Congress and the Commission have recognized, allowing local jurisdictions to impose separate RF compliance requirements undermines the Commission's traditional policy of promoting nationwide uniformity in the technical rules governing wireless services.[18] The Commission should therefore reject local government arguments for jurisdiction-by-jurisdiction enforcement of the Commission's rules.

II. THE COMMISSION'S FIRST SHOWING PROPOSAL IS SUFFICIENT TO DEMONSTRATE RF COMPLIANCE AND SATISFY LOCAL GOVERNMENTS' LIMITED RIGHT OF INQUIRY

As a responsible corporate citizen and Commission licensee which has invested enormous sums in acquiring PCS licensees and deploying personal wireless

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16 (...continued)
Optometry, 374 U.S. 424, 430 n.6 (1963) (FCC's jurisdiction "over technical matters" associated with the transmission of radio signals "is clearly exclusive"); *Mobil Telecommunications Technologies Corp.*, 6 FCC Rcd 1938 (1991), *aff'd*, 7 FCC Rcd 4061 (1992); *Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 MHZ Bands,* 5 FCC Rcd 3861 (1990); *Inquiry into the Use of the Bands 825-845 MHZ and 870-890 MHZ for Cellular Communications*, 86 FCC 2d 469, 505 (1981); *see also* PrimeCo Comments at 4-7 (discussing preemption of local RF interference regulation).

17 *See* 47 C.F.R. §§ 24.52 (PCS), 26.52 (GWCS), 27.52 (WCS); *Amendment of Parts 2, 15 and 97 of the Commission's Rules to Permit Use of Radio Frequencies Above 40 GHz for New Radio Applications*, 11 FCC Rcd 4481, ¶¶ 22-23 (1995); *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHZ Frequency Band Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHZ and 935-940 MHZ Band Allotted to the Specialized Mobile Radio Pool*, 9 FCC Rcd 7988, 8062-66 (1994);

18 *See* Ameritech Comments at 2-3; CTIA Comments at 7; PCIA Comments at 4; *see also* AT&T Wireless Comments at 4.

systems, PrimeCo takes seriously its legal obligation to design, construct and operate its facilities in full compliance with the Commission's RF exposure guidelines. Indeed, PrimeCo and other licensees fully understand that negligent or willful non-compliance with the Commission's RF exposure guidelines would be imprudent, as well as unlawful. As such, and consistent with the Commission's determination that state and local governments may reasonably make a limited inquiry as to whether a specific personal wireless service facility will comply with the Commission's RF guidelines, PrimeCo supports the first alternative showing proposal.[19]

Such a showing strikes an appropriate balance between state and local governments' limited right to make inquiries and the Commission's exclusive jurisdiction to establish and enforce RF radiation emission limits for personal wireless facilities. PrimeCo respectfully cautions, however, that any compliance showing requirement which effectively cedes enforcement authority to State and local governments at the expense of the Commission's exclusive jurisdiction will unlawfully undermine the Commission's establishment of uniform federal RF compliance and exposure standards. Such action would also delay service provisions and necessitate needless expenditures by wireless carriers to the detriment of the public.

A. The Commission's RF Emission Rules are Based on the Best Available Science

As the Commission is aware, efforts to adopt new RF radiation exposure guidelines began over four years ago.[20] Since that time, the Commission solicited

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19 *See Second MO&O* ¶ 142.

20 *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radia-*
(continued...)

the comments of other expert agencies, licensees, state and local governments, and numerous other interested parties as it considered new RF exposure standards developed by the American National Standards Institute/Institute of Electrical and Electronics Engineers ("ANSI/IEEE"), and the National Council on Radiation Protection and Measurements ("NCRP") — independent organizations recognized internationally for their scientific expertise on RF matters. As the Commission noted last year:

> In reaching our decision on the adoption of new RF exposure guidelines we have carefully considered the large number of comments submitted in this proceeding, and particularly those submitted by the U. S. Environmental Protection Agency ("EPA"), the Food and Drug Administration ("FDA") and other federal health and safety agencies. The new guidelines we are adopting are based substantially on the recommendations of those agencies, and we believe that these guidelines represent a consensus view of the federal agencies responsible for matters relating to the public safety and health.[21]

Indeed, as the Commission is aware, the EPA, FDA, National Institute for Occupational Safety and Health ("NIOSH") and the Occupational Safety and Health Administration ("OSHA") have all expressly indicated their support of the Commission's new RF guidelines.[22] Thus, any suggestion that the Commission's new RF guidelines are insufficiently protective or represent anything other than the best available science, contradicts the voluminous and substantive record in this proceeding

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20 (...continued)
tion, Notice of Proposed Rulemaking, 8 FCC Rcd 2849 (1993).

21 *First R&O* at 15124 (citations omitted).

22 *Second MO&O* ¶ 37.

and ignores the fact that the rules were coordinated with and incorporate the views of other expert agencies.[23]

B. The Commission's Enforcement Regime Supports Carrier Compliance with RF Emission Rules and Guidelines

Certain commenting parties assert that the Commission lacks the resources to adequately monitor and enforce licensee compliance with its new RF exposure guidelines and rules.[24] What these parties fail to acknowledge, however, is that the Commission's RF radiation rules and enforcement regime distinguish between those facilities with the greatest potential for exceeding the guidelines and those facilities that have little or no such potential, requiring commensurate degrees of compliance efforts and documentation.

In other words, it is not necessary for the Commission to monitor each and every licensed facility for compliance with the RF guidelines since many categories of facilities, including most PCS facilities, comply with the Commission's exposure guidelines by virtue of their technical and operational parameters. This is true regardless of the State or local jurisdiction in which the facility is located. Furthermore, licensees in services that do not require site-by-site Commission approval are nonetheless required to consider the environmental effects of proposed or modified facilities in accordance with the RF emission limits, and to perform routine evaluations and environmental assessments where required.[25]

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23 *See e.g.*, Ad Hoc Comments at 23-29.

24 LSGAC Comments at 2; NLC Comments at 24-25.

25 *See* 47 C.F.R. § 1.1312. Thus, the Commission should reject assertions that its

(continued...)

For non-categorically excluded facilities, the Commission's rules require more detailed routine evaluations involving site-specific compliance determinations and prior Commission approval and, in some instances, environmental assessments documenting the compliance status and environmental consequences of a particular facility. In other words, the Commission's entire compliance regime is designed to focus Commission scrutiny on those facilities most likely to exceed the RF guidelines, while avoiding needless burdens and expenditures scrutinizing facilities which pose no similar concern.

C. PrimeCo Supports the Commission's First Alternative Showing Proposal

As indicated in its comments, PrimeCo joins with other commenters supporting the Commission's first alternative showing proposal.[26] As an initial matter, however, PrimeCo wishes to note that the Commission's two showing proposals differ only with respect to the treatment of categorically excluded facilities. Thus, we observe that there are two issues in debate: 1) whether the first or second showing proposal for categorically excluded facilities (if either) is preferred, and 2) whether the Commission's proposal for non-categorically excluded facilities is sufficient.

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25 (...continued)
blanket licensing policies somehow compromise its enforcement abilities — such is not the case. *See e.g.*, Comments of LSGAC at 2; Comments of NLC *et al.* at 24-25.

26 Ameritech Comments at 5; BellSouth Comments at 5; GTE Comments at 9; PCIA Comments at 9-10; Sprint Comments at 8-10.

With respect to categorically excluded facilities, PrimeCo supports the first alternative showing proposal. Under this proposal, State and local governments would not be allowed to excessively burden personal wireless carrier with requests for compliance information above and beyond what the Commission has determined is necessary for ensuring compliance with its RF exposure limits. Specifically, although the Commission does not require the submission of any compliance documentation for categorically excluded facilities, PrimeCo does not object to providing local entities with a self-certification indicating that a particular facility is categorically excluded under the Commission's RF guidelines. Such a certification is minimally burdensome, does not frustrate the Commission's regulatory regime, and provides localities with all necessary information to understand the compliance status of a particular facility.

By contrast, PrimeCo opposes the Commission's second showing proposal for categorically excluded facilities for precisely the same reason. As numerous commenting parties have observed, the second proposal seeks to substantially *increase* State and local reporting obligations for licensees of facilities deemed least likely to exceed the Commission's exposure guidelines.[27] In PrimeCo's opinion, this proposal is so inconsistent with the Commission's environmental processing rules as to defy ready explanation. As AT&T observed, "[e]ven though the Commission found that the administrative burden of performing a routine evaluation for categorically excluded facilities exceeds the potential benefits, the Commission now proposes to permit state and local authorities to require such an evaluation without providing

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[27] Ameritech Comments at 7-8; AT&T Wireless Comments at 3-4; LSGAC Comments at 2; PCIA Comments at 11; SFO Comments at 5; Sprint Comments at 10.

any basis for doing so."[28] Simply put, allowing localities to nonetheless require necessary testing and compliance demonstrations for categorically excluded facilities would serve no scientific, legal or practical purpose.

With respect to non-categorically excluded facilities, PrimeCo joins those commenters supporting the Commission's proposal to allow State and local entities to demand copies of any compliance documentation submitted by the personal wireless licensee to the Commission as part of the licensing process. This proposal provides State and local land use authorities with sufficient information to inquire into the RF radiation compliance status of a particular facility without unnecessarily and improperly adding to a licensee's compliance burden.

III. "FINAL ACTION" MUST BE ABANDONED AS THE TRIGGER FOR COMMISSION JURISDICTION AND THE PROPOSED "FAILURE TO ACT" ANALYSIS SHOULD BE REVISED

The record supports PrimeCo's contention that the Commission's ripeness standard should be interpreted consistent with Section 332(c)(7)(B)(iv)-(v). The appropriate interpretation also plainly requires *rejection* of local government arguments that carriers must let the administrative process, no matter how lengthy, run its course prior to seeking Commission review.

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[28] AT&T Wireless Comments at 4.

A. Local Government Actions are Ripe for Appeal While Pending Before Local Zoning Board of Appeals

Local governments contend that "final action" occurs when a local government action is ripe for appeal to an appropriate state court. As PrimeCo and numerous parties noted, however, Congress provided that state and local government "action," not "final action," is subject to Commission review and preemption.[29] Thus, under a plain reading of the statute, an adversely affected party need not wait for final administrative action on an application and may petition the Commission to preempt a local facilities siting decision while its appeal is pending and, as PrimeCo noted, may petition for preemption of a generally applicable ordinance. Congress clearly intended that disputes over local RF emission regulation *not* be subject to the vagaries of the local administrative process, and the interpretation offered by PrimeCo is necessary to implement Congress' objectives.

B. Application Processing Time is Relevant Only to Determine the Outer Reach of the Commission's Preemptive Jurisdiction

The record indicates substantial disagreement over what constitutes a "failure to act." While a clear deadline would provide carriers some certainty,[30] PrimeCo generally agrees that a case-by-case approach is most appropriate in light of different practices and procedures among local jurisdictions.[31] The comments also demonstrate, however, that the Commission has unintentionally "muddied the waters" on this issue.

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29 *See* BellSouth Comments at 2; PrimeCo Comments at 10-11; SBMS Comments at 3-4; U S WEST Comments at 19.

30 *See* GTE Comments at 3-4; PCIA Comments at 7; Sprint Comments at 6.

31 *See* BellSouth Comments at 3; CTIA Comments at 4; SBMS Comments at 4.

Adopting PrimeCo's proposed standard, whereby the Commission would determine whether local inaction is motivated by concern for RF emissions, would greatly simplify this inquiry.[32] For example, where a local government requests information prohibited under the Commission's rules, and a licensee's siting application otherwise complies with the locality's requirements, if the locality affirmatively refuses to take action on the application this is the very "failure to act" prohibited under the statute and subject to preemption.[33] In this case, it would be irrelevant whether the local government's refuses to take action two weeks, two months or two years into the siting process.

To the extent that a specific time period is relevant to a determination of whether a local government has "failed to act," it is only relevant for purposes of determining the *outer limits* of the Commission's jurisdiction to preempt state or local inaction. Where, for example, a licensee has submitted an application and the local government simply refuses to address it at all, and the licensee can demonstrate that the delay is caused by concern for RF emissions, that locality's normal time frame for siting applications would be relevant and a licensee should not be foreclosed from seeking

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32 *See* PrimeCo Comments at 12-13.

33 At least one local government suggests that where an applicant refuses to provide all requested information, the locality's inability to process the application should not be considered a failure to act. Orange County Comments at 3. PrimeCo assumes that Orange County refers to local requirements not otherwise preempted by the Commission's RF radiation rules.

Commission review.[34] In this regard, PrimeCo also agrees with SBMS that moratoria should be excluded from the evaluation of what is a locality's typical processing time.[35]

IV. THE COMMISSION SHOULD ADOPT ITS PROPOSAL TO PREEMPT REGULATION PARTIALLY BASED ON RF EMISSION CONCERNS

A. Failure to Preempt Local Regulation Partially Based on RF Emission Concerns Would Undermine the Commission's Preemptive Authority

PrimeCo noted in its comments that if the Commission does not preempt local regulation only partially based on concern for RF emissions, "a state or locality could easily circumvent the Commission's preemptive authority by providing a 'laundry list' of reasons purportedly justifying its action or inaction." NLC confirmed in its comments that localities would no doubt view a Commission backtrack on this issue as carte blanche to do just that, stating that:

> [Where] a local government decision denying a permit or variance to a wireless provider sets forth multiple grounds for the decision — aesthetics in a residential or historical area, public safety concerns over the structural integrity of the facility, and concerns over RF emissions — . . . unless or until a court determined . . . whether the other rationales of the local decision were inconsistent with Section 332(c)(7)(B)(i)-(iii), *the local decision to deny the permit would still stand.*[36]

NLC and others seem to contend that Congress did not mean it when it said that localities are prohibiting from basing regulation "*directly or indirectly* on the environmental effects

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34 The Commission should also reject NLC's overly broad contention that the Commission should "leave 'failure to act' disputes to the courts." NLC Comments at 10. While a carrier may find judicial review under the Section 332(c)(7)(B)(ii) "reasonable time" requirement a more desirable option under the facts of a particular case, this is a matter left to the carrier's discretion by statute.

35 SBMS Comments at 4.

36 NLC Comments at 14-15 (emphasis added).

of radio frequency emissions."[37] If the Commission backtracks on its original proposal, PrimeCo submits that the local governments will heed this advice to immunize their actions from Commission review, thereby rendering meaningless the exclusive authority granted the Commission under Section 332(c)(7)(B)(iv)-(v).

B. Commission Review of Regulation Based on RF Concerns but for which no Formal Justification is Provided Does not Undermine First Amendment Values or Intrude on Local Legislative Authority

Commenters have mischaracterized the Commission's proposal. No one is suggesting that a citizen's mere mention of RF emissions at a public hearing would taint the entire proceeding; or that citizens be prohibited from exercising their First Amendment rights; or that the Commission initiate an inquisition of local government authorities. What the Commission and wireless service providers maintain — and what the Communications Act requires — is that state and local regulation can not be based in any way on RF emission concerns. Local governments are perfectly capable of weeding out inappropriate information and determining from an administrative record what can be the basis for a legitimate facilities siting decision. Preemption as proposed by the Commission would simply require that local governments comply with the Communications Act and make those determinations.

Furthermore, as a *practical matter*, carriers would be foolish to petition the Commission if the public hearing record included only minimal reference to RF emission concerns. In these circumstances, a carrier may instead seek judicial review

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[37] Conference Report at 208.

under the Section 332(c)(7)(B)(iii) substantial evidence requirement.[38] Where it is clear from the administrative record, however, that a locality is merely conceding to vocal concerns raised regarding RF emissions, the Commission should not be foreclosed from preemption.[39]

C. The Commission Should Not Preclude Preemption of Private Entities' Actions Where Appropriate

There is considerable disagreement as to whether the Commission's jurisdiction includes the preemption of private entities' actions. The actions of home-owner associations and private covenants have traditionally been afforded protection under state and local zoning law.[40] By that same token, however, private actions may have the effect of prohibiting CMRS deployment and service provision. PrimeCo therefore agrees with AT&T Wireless that, where a homeowner association or other private entity is effectively delegated the authority to regulate personal wireless facilities, the Commission should be able to preempt such entities' actions.[41] Zoning and

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38 Where, for example, a zoning board expressly eliminates concern for RF emissions as a basis for its decision, but otherwise bases its decision on a seemingly scanty record, judicial review may be more appropriate. *See Illinois RSA No. 3, Inc. v. County of Peoria*, 963 F.Supp. 732 (C. D. Ill. 1997); *BellSouth Mobility, Inc. v. Gwinnett County*, 944 F. Supp. 923 (N.D. Ga. 1996).

39 This scenario was set forth in the Bureau's January 17, 1997 letter responding to the Cellular Telecommunications Industry Association's request for guidance on facilities siting issues in the 1996 Act. *See* Letter to Thomas E. Wheeler, President and CEO, CTIA, from Michele C. Farquhar, Chief, Wireless Telecom. Bur., 6 Comm. Reg. (P&F) 119 (rel. Jan. 17, 1997).

40 20 Am. Jur. 2d COVENANTS § 242 (1995); 83 Am. Jur. 2d ZONING AND PLANNING §§ 15-16 (1992).

41 AT&T Wireless Comments at 7; *see Marsh v. Alabama*, 326 U.S. 501 (1946) (operation of a company town subject to constitutional limitations because

(continued...)

planning are areas traditionally reserved to state and local governments, and where private associations have assumed such responsibilities, Commission preemption should not be precluded.[42]

V. THE COMMISSION'S PROCEDURES

A. The Rebuttable Presumption Standard is Well Within the Commission's Discretion to Adopt

A number of local government entities oppose the Commission's proposed rebuttable presumption standard. NLC asserts that the rebuttable presumption "assume[s] away" the Commission's purportedly limited authority, and other parties assert that because carriers have better access to evidence of compliance, that the rebuttable presumption should not be adopted.[43] As a threshold matter, it is the Commission's role, not state and local governments', to determine what is necessary for carriers to show compliance with the Commission's own rules and, as discussed above, states and localities may not impose additional burdens as a means of second-guessing those rules.

More fundamentally, local governments misstate fundamental law regarding burdens of proof and rebuttable presumptions in the administrative context. Under Section 554(d) of the Administrative Procedure Act ("APA") (and by incorporation Section 556) a party initiating a proceeding has, at a minimum, the burden

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41 (...continued)
governance of townships is traditionally a public function).

42 83 Am. Jur. 2d ZONING AND PLANNING §§ 15-16 (1992).

43 NLC Comments at 27.

of establishing a *prima facie* case.[44] Furthermore, a burden of proof may also rest on other parties seeking a different decision by the agency.[45] Thus, agencies already have discretion in allocating burdens of proof in their own proceedings. Furthermore, burdens of proof and rebuttable presumptions in agency proceedings also are dependent on an agency's authorizing statute.[46] Thus, it is in the context of the APA and the Communications Act — not vague and inapplicable references to "general rules about presumptions" — that the Commission's proposed rebuttable presumption must be considered.[47]

B. The Rebuttable Presumption Standard Comports with the APA and Communications Act and Protects State and Local Governments' Legitimate Interests

In light of the statutory underpinnings of the proposed rules, local governments' contentions regarding the rebuttable presumption of carrier compliance must be rejected. Parties familiar with the Commission's declaratory ruling and complaint proceedings know that carriers could not simply assert, without explanation, that a locality's siting decision or ordinance contravenes Section 332(c)(7)(B)(iv).[48] Under the

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44 5 U.S.C. § 556(d); Sen. Rep. No. 97-245, at 270 (1945).

45 APA Senate Report at 270; *see generally* Stein *et al.*, *Administrative Law* § 24.02 (Sept. 1997).

46 *See American Trucking Ass'ns v. United States*, 344 U.S. 298, 318-320 (1953); *see generally* Stein *et al.* §§ 24.02, 24.04.

47 *See* NLC Comments at 27.

48 *See, e.g., Zell Miller et al. v. Station WCTV (TV), Thomasville, Ga.*, 1997 FCC LEXIS 4155, DA 97-1626, ¶ 5 (rel. Aug. 5, 1997); *Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHZ Band by the Private Land Mobile Radio Service*, 11 FCC Rcd 188, 277-78 (1995); *see also*

(continued...)

proposed procedures, the Commission would consider preemption requests pursuant Section 554(d) and 556 of the APA which, as discussed above, require carriers to present a *prima facie* case.[49] Thus, the Commission's rules, as proposed, *already* require carriers to submit the showing required under law.

Furthermore, the rebuttable presumption is clearly supported by the Commission's "organic statute" — the Communications Act. It is well-settled that the Commission has broad authority to determine how it will regulate the entities subject to its jurisdiction[50] and, as the Commission has duly noted, presumptions of carrier compliance have been adopted in numerous instances.[51] The Commission here has appropriately balanced its broad preemption authority under Section 332(c)(7)(B)(iv) with state and local governments' legitimate interest in protecting public health and safety.[52] The

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48 (...continued)
Beehive Telephone, Inc. v. The Bell Operating Cos., 10 FCC Rcd 10562 (1995) (Section 202 rate complaint deemed insufficient).

49 Section 1.2 of the Commission's rules was adopted pursuant to Section 554(d) of the APA.

50 *See, e.g., United States v. Southwestern Cable Co.*, 392 U.S. 157, 172 (1967); *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1358-59 (D.C. Cir. 1993); 804 F.2d 1280, 1292 (D.C. Cir. 1986); *AT&T v. FCC*, 572 F.2d 17, 26 (2d Cir. 1978); *see also* 47 U.S.C. § 154(j) (empowering the Commission to "conduct [its] proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice").

51 *Notice* ¶ 151 n. 212. In fact, the Commission's *Competitive Carrier* decision to classify the tariffs of non-dominant carriers as *presumptively* lawful was premised, in large part, on the Commission's broad regulatory discretion. *See Competitive Carrier Rulemaking*, 85 FCC 2d 1, 12-13, 30 (1980).

52 The Commission should reject NLC's contention that "health and public safety" concerns justify eliminating the rebuttable presumption, as this could swallow up the Commission's preemptive authority in a number of other areas. *See* NLC at (continued...)